IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 13 OF 2004.

Shri Chandrakant Laxman Kerkar,
major, married, business,
resident of House No. 169/A-9,
Durga Bhat, Ponda, Goa. .... Petitioner.

Versus

1. Sai Mundra Finance Pvt. Ltd.
   A private Limited Company,
   registered under Companies Act,
   having its office at Ponda, Goa,
   through its Director,
   Shri Vishnu V. Naik,
   resident or Durgabhat, Ponda, Goa.

2. State,
   Through the Public Prosecutor. .... Respondents.

Shri V.A. Lawande and Ms. H. Fernandes, Advocates for the Petitioner.

Shri S.D. Lotlikar, Senior Advocate with Ms. S. Naik, Advocate for the Respondent No.1.

Shri S.N. Sardessai, Public Prosecutor for the Respondent No.2.

CORAM: N. A. BRITTO, J.

DATE: 4th March, 2005.

ORAL JUDGMENT:

The petitioner herein is accused in C.C. No. 64/02 who has been convicted and sentenced under Section 138 of the Negotiable Instruments Act, 1881 to undergo S.I. for a period of one year and to pay compensation of Rs.6,70,000/- to the complainant and in default to undergo S.I. for a period of one month by Order dated 21.11.02 of the learned J.M.F.C., Ponda and which conviction/sentence has been upheld by the learned Ist Addl. Sessions Judge, Panaji in Criminal Appeal No. 24/03.

2. The parties hereto shall be referred to in the names as they appear in the cause title of the said case.

3. The case of the complainant was that the accused had issued to the complainant a cheque dated 20.3.02 for Rs.6,70,000/- which sum was due to the complainant, the accused being a loanee towards the outstanding loan amount and that when the complainant deposited the said cheque on 27.3.02 with his banker, the said cheque was returned unpaid with the remark “funds insufficient” and therefore the complainant sent to the accused an Advocate's notice dated 1.2.02 calling upon the accused to pay to the complainant the said sum of Rs.6,70,000/- which the accused received but did not make any payment. The complainant therefore filed

the said complaint.

4. The complainant examined its Vice Chairman in support of their case and also the Branch Manager of Bicholim Urban Cooperative Bank Ltd., wherein the complainant had deposited the cheque. The accused also examined himself and stated that he had taken a loan from the complainant of Rs.1,00,000/- after mortgaging his property to the said complainant by depositing the title documents and at that time he had also given blank cheques to the complainant as security for its payment. The accused also stated that he had paid an amount of Rs.70,000/- to Rs.80,000/- as on that date. He produced a statement of his account at Exh.DW1/A, which showed that as on 16.9.02 there was an outstanding balance of Rs.1,38,000/- in the loan account of the accused, and which also showed the initial disbursement of the loan was of Rs.1,00,000/- .

5. At the time of hearing, Shri Lawande, the learned counsel of the accused, filed an application to bring on record a copy of the complaint filed by the complainant against Ditendra C. Kerkar and Smt. Tanuja N. Kerkar, the son and daughter-in-law of the accused respectively, in respect of the cheque for Rs.3,89,000/- dated 12.8.04. It is the submission of Shri Lawande that this complaint also relates to the same transaction and therefore needs to be taken into consideration by this Court in exercise of

this Court's powers under Sections 401 r/w S.391 of the Code of Criminal Procedure, 1973.

6. On the other hand, Shri Lotlikar, the learned counsel of the complainant submits that the cheque in question of Rs.6,70,000/- was issued by the accused in repayment of the loans taken by his family members, the accused having been a guarantor for the repayment of the same and if at all the said complaint has been filed in respect of a cheque for Rs.3,89,000/-, the same pertains to a subsequent cheque issued by the said accused in the said case on or about 12.8.04 after the amount due on the cheque of Rs.6,70,000/- could not be realised. In my view, there is no necessity of taking the said complaint on record of this case and this case can be decided on the evidence adduced by both the parties before the learned J.M.F.C. The application dated 14.12.04 for production of additional evidence/documents is therefore hereby rejected. The said accused would be free to take all defences as available to them in law in the said case.

7. Shri Lawande, the learned counsel of the accused submits that it was the case of the complainant in the complaint that the cheque for Rs.6,70,000/- dated 20.3.02 was issued by the accused as a loanee of the complainant. Shri Lawande submits that Exh.DW1/A dated 18.9.02

shows that the loan which was disbursed to the accused was only of Rs.1,00,000/- and as on 16.9.02 the accused was liable to pay to the complainant only Rs.1,38,000/- and therefore the complainant came forward with a false case which ought not to have been accepted by both the Courts below inasmuch as both the Courts below also did not take into account the said Exh.DW1/A.

8. In my view the submissions of Shri Lawande cannot be accepted. Although the complainant stated in his evidence that the accused had obtained a loan of Rs. 5 lakhs and the accused produced Exh.DW1/A which showed that the accused had taken a loan of Rs.1 lakh only, what the complainant probably wished to convey was that the accused had taken a loan of Rs. 5 lakhs through his family members. The accused himself got produced Exhs.PW1/B Colly – six applications for loan made by the accused and his family members to the complainant. The complainant denied the suggestion that the accused and his family members were not liable to pay the loan of Rs.5,00,000/- and therefore they were not liable to pay to the complainant a sum of Rs.6,70.000/-. Moreover, the evidence on re cord clearly showed that the cheque was issued by the accused in repayment of the loan repayment of the loan taken by him and his family members for which he had stood as a guarantor. The learned Addl. Sessions Judge has rightly observed that

the accused had mortgaged a property of his own for the entire loan amount of Rs.5,00,000/- and not only for Rs.1,00,000/- loan obtained in his own name. Likewise, the Addl. Sessions Judge had rightly observed that the said loan of Rs.5,00,000/- was taken for the transport business conducted by the accused himself, through his family members as well. The accused had also paid Rs.75,000/- towards the loan accounts. The learned Addl. Sessions Judge had also observed, and in my view rightly, that the accused had taken a loan of Rs. 1 lakh and stood as surety for the loans of Rs. 1 lakh each taken by his wife, daughter-in-law and two sons. Likewise, the learned Addl. Sessions Judge had further observed that the documents showed that interest payable was 36% per annum and therefore the liability of the accused and his family members as on 20.3.02 would not be less than Rs.6.70 lakhs.

9. The contention of the accused that he had given a blank cheque has not been accepted by the both the Courts below and, in fact, as rightly observed by the learned Addl. Sessions Judge, the issuance of cheque was not disputed by the accused. Once a cheque is admitted to have been issued it carries with it several presumptions namely presumptions available under Ss.138, 139 and 118 of the Negotiable Instruments Act, 1881. The accused was unable to rebut any of the presumptions. The presumption under S.139 of the Act is mandatory as the words used are

"shall be presumed". The effect of this presumption is to place the evidential burden on the accused to prove that the cheque was not issued towards discharge of debt or liability and merely denial would be insufficient to discharge the presumption like in the case at hand. The conviction of the accused cannot be faulted. In the aforesaid situation, the contention that Exh.DW1/A was not considered by both the Courts below could not be accepted to upset the judgments of conviction passed by the learned J.M.F.C. and upheld by the learned Addl. Sessions Judge.

10. Regarding sentence, Shri Lawande has submitted that the accused has been inflicted with the maximum sentence of one year which could have been imposed at the relevant time. Shri Lawande has next submitted that the accused has undergone sentence of three months and seven days and considering the same and the age of the accused which is about 68 years, some leniency be shown to the accused by reducing the said sentence.

11. Shri Lotlikar, the learned senior counsel of the complainant, has submitted that the age of the accused would not be more than 61 years since it was stated by the learned J.M.F.C. that the accused was 58 years of age at the time when his evidence was recorded. Shri Lotlikar has also submitted that this revision petition was adjourned on several occasions to enable the accused to make payment of the loan taken by the accused

and his family. It is his submission that the accused has not been able to repay his liability which, as a guarantor, i s co-extensive with that of the principal debtor.

12.Shri Lotlikar has placed reliance on the decision of ***Suganthi Suresh Kumar v. Jagdeeshan [(2002) 2 S.C.C., 420]. This was a*** case which was remitted back to the trial Court to impose appropriate sentence after hearing both the sides, since the Hon'ble Supreme Court had found that in a case of bouncing of cheque of over 4 lakhs , sentence of imprisonment till rising of the court and fine of Rs.5000/- was a flea-bite sentence.

13.In my view, considering the amount of cheque which has bounced and also considering that the learned J.M.F.C. has directed the accused to undergo imprisonment only for the period of one month in default of payment of compensation of Rs.6,70,000/-. I do not find that there is scope for any further reduction of the sentence. There is no material placed before this Court to justify the reduction of sentence which has been imposed by the learned J.M.F.C. and upheld by the learned Addl. Sessions Judge.

14. In view of the above, I find there is no merit in this revision petition which is hereby dismissed with costs.

N. A. BRITTO, J.

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